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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1096

THE NEZ PERCE TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 16-22) is not reported.

JURISDICTION

The judgment of the Court of Claims was entered October 6, 1941 (R. 22-23). Motions for a new trial were overruled January 5, 1942 (R. 23). The petition for writ of certiorari was filed April 2, 1942. Jurisdiction of this Court is invoked under section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended (28 U. S. C. sec. 288), and the Act of February 2, 1929, c. 275, 45 Stat. 1249.

QUESTION PRESENTED

Whether the provisions of the Nez Perce treaty of June 11, 1855, setting apart a reservation for the exclusive use of the tribe and declaring that no white man should reside there without permission constituted a guaranty on the part of the United States, running to the tribe, against any trespasses by white men upon the reservation.

STATUTE AND TREATY INVOLVED

Section 1 of the Act of February 20, 1929, c. 275, 45 Stat. 1249, provides:

That jurisdiction is hereby conferred on the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, notwithstanding lapse of time or statutes of limitation, to hear, determine, adjudicate, and render final judgment on all legal and equitable claims of whatsoever nature of the Nez Perce Tribe of Indians in Idaho, or of any band thereof, against the United States, arising under or growing out of the original Indian title, claim, or rights of the said Indian tribe or any band thereof, including all title, claim, or rights growing out of treaties of June 11, 1855 * * *, and June 9, 1863 * * * with the said Nez Perce Tribe or bands of Indians, in connection with the Nez Perce Indian Reservation in the States of Idaho

and Oregon, and more particularly as to the following claims: * * *

* * * * *

3. Claim for gold mined and removed by white men, without authority and in trespass, from the Nez Perce Indian Reservation lands in Idaho prior to the treaty of June 9, 1863, and its approval or ratification by the Senate on April 17, 1867 * * * ceding such lands to the United States, such claim, in any event, not to exceed one-eighth of the amount of gold so mined and removed: *Provided*, That this Act shall not be construed as creating any rights which may be made the basis of a legal or equitable cause of action but shall only authorize the said Nez Perce Tribe of Indians to present to the United States Court of Claims for adjudication such legal rights and claims, if any, which may exist under the treaties and agreements mentioned in this Act.

Article II of the treaty of June 11, 1855, 12 Stat. 957, 958, established a reservation for the Nez Perce tribe of Indians and went on to provide that—

All * * * [such] tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon said

Reservation without permission of the tribe
and the superintendent and agent; * * *

STATEMENT

Petitioner filed a petition in the court below claiming, *inter alia*, that it was entitled to recover from the United States \$3,200,000 on account of gold mined on its reservation and removed by white men up to the time of negotiation of the treaty of June 9, 1863 (R. 10-11).¹ The Court of Claims found that in 1860 gold was discovered on land "alleged to be within the lands reserved by the treaty of 1855";² that white men, without permission, established settlements thereon and extracted a large quantity of gold; and that efforts made by the Government to exclude the whites were unsuccessful (R. 15). The court concluded as a matter of law that petitioner was not entitled to recover

¹ In its findings (R. 15) and opinion (R. 20) the Court of Claims referred to the petitioner's claim as covering the period up to the agreement of May 1, 1893, ratified by Congress in the Act of August 15, 1894, c. 290, 28 Stat. 286, 326-332. As the jurisdictional act and the petition in that court disclose, the reference to the 1893 agreement was inadvertent.

² It is to be noted that the court below did not find that the gold sites were within the reservation. The 1855 treaty established as the eastern boundary of the reservation "the spurs of the Bitter Root Mountains." 12 Stat. 957-958. In the Court of Claims the Government contended that this description meant the western ends of the "spurs" and hence that the gold sites were outside the reservation (see R. 12A). In deciding the case the court found it unnecessary to pass upon this contention.

the value of any gold removed (R. 15), and entered judgment accordingly (R. 22-23).

ARGUMENT

The treaty of 1855 provided that a reservation should be set aside for the Nez Perce Tribe exclusively and that, except with permission, no white man should reside on it. Petitioner contends (Pet. 3, 6, 7-8) that "under recognized rules of international treaty interpretation" these provisions render the United States liable for the value of gold mined and removed from the alleged reservation lands by white men who were there without permission. As sole support for its contention, petitioner cites (Pet. 7-8) commentaries and state papers dealing with the measure of protection due to aliens from the sovereign within whose jurisdiction they are sojourning. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), c. V, secs. 86, 87, pp. 213-219; Hall, *International Law* (7th ed. 1917), Part II, c. IV, sec. 65, pp. 226-232; Moore, *International Arbitrations* (1898), Vol. 2, pp. 1653-1655 (Case of Ruden & Co.), Vol. 3, pp. 2456-2461 (Case of de Brissot), pp. 3039-3043 (Wipperman's Case); *Foreign Relations of the United States* (1904), pp. 352-369, 657-677.

These authorities are not in point. The rule which they announce—that a sovereign is justified under certain circumstances in seeking indemnity from a foreign government for injuries done in the

foreign country to the persons or property of citizens of the complaining sovereign—does not depend on treaty but obtains even in the absence of treaty relations between governments.³ Consequently, it does not aid in interpretation of the provisions of the Nez Perce treaty here involved.

As the court below well stated, the provision of Article II against the settlement of whites on the Nez Perce reservation merely emphasized the exclusive character of the Indians' right to enjoyment of the lands reserved (R. 20-21). This provision at most imported an undertaking by the United States to perform the appropriate govern-

³ It may well be doubted whether the rule invoked has any application to Indian tribes. While, as petitioner states (Pet. 7), an Indian tribe can make treaties with the United States (*Worcester v. Georgia*, 6 Pet. 515, 559-560), Indian tribes are not recognized in international law as independent nations. 1 Hyde, *International Law* (1922), sec. 10, p. 19. In *Cherokee Nation v. Georgia*, 5 Pet. 1, this Court, speaking through Chief Justice Marshall, said (p. 17): "They may, more correctly, perhaps, be denominated domestic dependent nations. * * * They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility." Accord, *Holden v. Joy*, 17 Wall. 211, 242; *Jones v. Meehan*, 175 U. S. 1, 10.

In any event, application of the rule here would not make the United States liable for the mining and removal of gold from the reservation but only for injuries sustained by Nez Perce Indians while in American territory outside the reservation—"abroad," from the Indians' standpoint.

mental function of the dominant sovereign of protecting the tribe in possession of its property through available police measures and by affording judicial redress against wrongdoers (R. 21).⁴ No guaranty by the Government, that it will respond in damages to the Indians in the event of private trespasses on the reservation, should be implied. Cf. *Leighton v. United States*, 161 U. S. 291, 296; *Blackfeet et al. Nations v. United States*, 81 C. Cls. 101, 119-123. And in any event the Government's obligation under Article II is not one of law that is judicially cognizable.

CONCLUSION

The decision of the Court of Claims is correct, and no conflict is presented. It is therefore respectfully submitted that the petition should be denied.

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MAY 1942.

⁴ Petitioner in its petition in the Court of Claims (R. 10-11) made no allegation that the United States either instigated or connived at the trespasses complained of. The court below found, on the contrary, that the Government had endeavored to exclude the whites from the reservation but that its efforts had been unsuccessful (R. 15).